HING MOH SDN. BHD.

v.

PERDAMA-CMCC SDN. BHD.

HIGH COURT BORNEO, KUCHING
DATO' HAJI ABDUL KADIR BIN SULAIMAN J.
[SUIT NO. KG 101 OF 1992 (II)]
30 DECEMBER 1993

CONTRACT: Agreements for sale and purchase of property - Agreements providing for payment of purchase price by instalments and transfer of properties to plaintiff upon full payment of purchase price - Subsequent execution of supply agreement to supply sawn timber to developers' contractor - Supply agreement varying terms of payment in sale and purchase agreements - Supply agreement providing that purchase price to be paid by way of deductions from progress payments made by developer to contractor - Plaintiff supplying the sawn timber but defendant refusing to transfer properties to plaintiff - Plaintiff claiming for specific performance and damages - Whether there was any defence on the merits - Whether plaintiff entitled to judgment.

The plaintiff entered into an agreement with the defendant, a developer, on 2 April 1991 for the purchase of two units of single storey dwelling houses to be built in lot 4912 and lot 4913 of the project, and the purchase price of each unit was RM63,000, making a total of RM126,000. The mode of payment was to be in instalments as set out in the schedule to the agreement. On the following day a supply agreement was entered into between the plaintiff, the defendant and the contractor under which the plaintiff was to supply sawn timber amounting to about RM200,000 and the sale price of the dwelling houses under the sale and purchase agreement was to be appropriated by the defendant from the deduction of 10% from each of the contractor's progress claims certified by the architect. It was set out under Clause 5 of the supply agreement that the payment for the 2 dwelling houses was to be in the manner set out in the supply agreement and other terms were to be in accordance with the sale and purchase agreements. The plaintiff supplied the sawn timber to the contractor, and the contractor's progress claims were duly certified by the architect. The plaintiff through his solicitors wrote to the defendant for the transfer of the properties which the defendant failed to do. The plaintiff sought a declaration that the full payment of the price for the properties had been effected and that the plaintiff is entitled to the transfer of the property in its favour.

The defendant pleaded that the contractor was overpaid and that he did not complete the construction and that the defendant had to engage sub-contractors for the completion of the project and that it had failed to deduct RM66,946.64 from the contractor. The defendant further contended that the supply agreement cannot be enforced against it as it was for past consideration. The defendant also made a counter claim for the balance sale price. The plaintiff prayed for judgment to be entered against the defendant and for striking out its defence and counter claim under the Rules of the High Court.

Held:

[1] The issue between the contractor and the defendant does not in any way affect the defendant's obligations to the plaintiff under the sale and purchase agreements as varied by clauses 2 & 5 of the supply agreement. The progress claims of the contractor have been certified by the architects and it was for the defendant to make the deductions. The defendant's failure to do so cannot be an answer to avoid its obligations under the sale and purchase agreements.

[2] There is a distinct contract between the plaintiff and the contractor for the supply of the sawn timber. If there is anything uncertain about the quantum of the sawn timber supplied, it is a matter between the contractor and the plaintiff and has nothing to do with the defendant and is not a issue here as between the defendant and the plaintiff. In the circumstances the defendant's defence that the supply agreement is void or unenforceable for uncertainty was without merit.

[3] Section 2(e) of the Contracts Act 1950 says that every promise and every set of promises, forming the consideration for each other, is an agreement and by s. 2(h) an agreement enforceable by law is a contract. In the circumstances of this case, the supply agreement is a valid agreement and to say that it fails for want of consideration is not tenable at all.

[4] The effect of the clear and unambiguous provision of clause 5 of the supply agreement was that the parties had agreed to vary the relevant terms of the sale and purchase agreements by the provision of a fresh consideration. Therefore the defence that the supply agreement cannot be enforced for past consideration was without any merit.

[5] The defence was a sham and there was no defence to the action. The plaintiff's claim must necessarily be allowed. The defendant's counterclaim was in the nature of a claim for the alleged balance purchase price. As the plaintiff had shown that the purchase price had been paid in full *as per* the terms of the supply agreement, the counterclaim must necessarily fail.

[Plaintiff's claim allowed with costs. Specific performance ordered. Defence and counterclaim struck out].

Legislation referred to:
Contract Act 1950, s. 2(e), (h)
Rules of High Court 1980, O. 14, O. 18 r. 19

For the plaintiff-Bexter Michael; M/s. Ee & Lim
For the defendant-Paul Tang; M/s. Tan & Yap

JUDGMENT

Haji Abdul Kadir bin Sulaiman J:
On 7 December 1993 I delivered an oral judgment after hearing the further arguments in open Court, giving judgment for the plaintiff under O. 14 and O. 18 r. 19 of the Rules of the High Court 1980 and I indicated that the reason for the decision would be given later which I now do.

By a writ of summons issued on 6 October 1992 the plaintiff claims for a declaration that by the operation of the supply agreement it had made and effected full payment for the price of properties covered by the sale and purchase agreements and is entitled to a valid and registrable memoranda of transfer in respect of the same duly executed by the defendant together with the delivery to the plaintiff of the relevant documents of title and the defendant's share of the stamp duties and registration fee payable upon submission of the said Memoranda of Transfer. The plaintiff also claims for specific performance of the sale and purchase agreements, damages for breach of contract in lieu of or in addition to specific performance, such further or other relief as is just and costs.

On 15 January 1993 the defendant filed its defence and counterclaim. By a summons in chambers dated 18 March 1993 the plaintiff applied under O. 14 of the Rules of the High Court 1980 (hereinafter referred to as "the RHC") for judgment to be entered against the defendant on its claim on the ground that there is no defence to this action, and alternatively for an order that the defence and counterclaim of the defendant be struck out and judgment be entered accordingly against the defendant pursuant to O. 18 r. 19 of the RHC on the grounds that the defence and counterclaim disclose no reasonable defence and reasonable cause of action, that they are scandalous, frivolous or vexatious, may prejudice, embarrass or delay the fair trial of the action, or are otherwise an abuse of the process of Court. The application of the plaintiff is supported by the affidavit of Loh Man Dee, its Director, affirmed on 18 March 1993. The defendant filed an affidavit in opposition affirmed by Cyprian Tan Pia Jin, its Manager on 10 May 1993.

The defendant is a developer of a housing project known as Phase 4 Matang Jaya, Jalan Matang, Kuching, Sarawak. The main contractor (hereinafter referred to as "the contractor") for the project was Projek Sindiket Sdn. Bhd. The plaintiff entered into two identical sale and purchase agreements with the defendant for the purchase of two units of single storey intermediate

terrace dwelling houses to be built in the project respectively described as Lot 4912 and Lot 4913 (hereinafter referred to as the "said properties"). The purchase price for each unit is RM63,000 making a total of RM126,000 for the two units. Clause 3 of each of the Sale and Purchase Agreement, exhibited as LMD1 and LMD2 to the affidavit of the plaintiff provides that the purchase price shall be paid-by the plaintiff to the defendant "by the instalments and at the time and in the manner as prescribed in the First Schedule annexed hereto and all such instalments shall be paid by the purchaser to the vendor within fourteen (14) days from the date of the receipt of a notice from the vendor requesting the payment of such instalments due." According to the said Schedule, the payments were due in 10 instalments based on the progress of the construction of the said properties. Clause 22 (ii) of the said agreement *inter alia*, provides that upon the full payment of the purchase price and observation by the plaintiff of the terms thereunder, "the vendor shall, forthwith upon the issue of the document of title to the said property, execute a valid and registrable transfer of the said property to the purchaser." On 3 February 1990 the relevant documents of title were issued and registered in the name of the defendant but the defendant refused to execute valid and registrable transfer of the said properties the plaintiff. The reason being, according to the defendant, is that the plaintiff had not made the full payment of the purchase price. According to the defendant, a sum of RM66,946.64 remains to be paid by the plaintiff. This amount is the subject-matter of the counterclaim of the defendant. The plaintiff, on the other hand, says that it had fully settled the amount based on clause 2 of the supply agreement entered into between it, the defendant and the contractor.

This so called supply agreement was executed by the three parties on the day after the execution of the sale and purchase agreements mentioned above, i.e. on 2 April 1991. In the agreement, the plaintiff is referred to as the supplier, the defendant the developer and the contractor as the main contractor. The two sale and purchase agreements mentioned above are recited in this agreement. It is also mentioned that the contractor has contracted with the plaintiff for the supply of sawn timber amounting to approximately RM200,000. The agreement is embodied in five clauses which are as follows:

1. The supplier shall supply to the main contractor sawn timber amounting to approximately Malaysian Ringgit: Two Hundred Thousand only (RM200,000).
2. The full purchase price of the said property shall be paid to the developer through deductions of ten percent (10%) of each of the main contractor's progress claims as certified by the architect until such time as when the full purchase price shall become fully settled.
3. In consideration of 2 above, the supplier shall credit the main contractor's account with the supplier for the same amounts.
4. The balance due to the supplier by the main contractor shall be paid in a manner agreeable to both parties.
5. Except for the method of payment for the said property as mentioned in 2 above, all other terms and conditions contained in the said sale and purchase agreements between the developer and the supplier shall remain unchanged.

It is in evidence that from time to time progress claims certificates were issued by Daniel Ngelingkong ak Chindan registered with Lembaga Akitek Malaysia and of relevance are LMD4 to LMD10 exhibited to the plaintiff's affidavit, addressed to the defendant pertaining to Progress Claim No. 13 to 19 with instructions for the payment to be paid direct to the contractor. All the certificates, except for No. 17 were verified by Projek Sindiket Sdn. Bhd., the contractor. No explanation is given as to the reason why certificate No. 17 was not so verified. In any event, in my view, it is irrelevant because for the purpose of clause 2 of the supply agreement what was necessary was the Progress Claim as certified by the Architect. Based on the 7 certificates the total amount due to the contractor from the Defendant is RM1,310,866.30. Ten percent of that would be RM131,086.63 which is more than the purchase price for the said properties. LMD10 was dated 13 February 1992. So on 28 April 1992, by a letter exhibited as LMD11, the plaintiff through its solicitors wrote to the defendant referring to the supply agreement, requiring the defendant to make arrangements for the transfer of the said properties to it and to let it know when the Memoranda of Transfer may be executed. Receiving no response from the defendant, by another letter exhibited as LMD13 to the affidavit, the plaintiff gave the defendant 10 days

notice from the date of the letter to transfer the said properties to the plaintiff or else legal proceedings would be taken seeking all remedies available including the transfer or vesting of the said properties to or in the plaintiff. Hence the writ.

For the purpose of O. 14 of the RHC, if I am satisfied that the defence is being put up for the purpose of delay or the defence is a sham the plaintiff's application would be allowed. I am to be satisfied that the issues are clear. Since in this case there is a counterclaim by the plaintiff I bear in mind that if the application of the plaintiff is granted whether a stay of execution be granted pending the hearing of the counterclaim of the defendant or that whether the defendant is entitled to unconditional leave to defend the action as according to the defence of the defendant, it is relying on its counterclaim by way of set off in diminution or extinction of the plaintiff's claim. Bearing all those matters in mind I shall now proceed to deal with the matter. Firstly, the defendant by its defence says that it did not at all material times owe the contractor any money at all but instead the contractor has been overpaid. The contractor abandoned the project and so other contractors were employed to complete the same. Is this a valid defence? I am sorry to say that this is not a valid defence at all. LMD4 to LMD10 is clear evidence that sums of money by way of progress claims are certified due from the defendant to the contractor and not to anyone else, and by virtue of clause 2 of the supply agreement 10% of it is to be deducted to meet the purchase price of the said properties for so long as the same were not fully paid. The issue as to whether the project was abandoned or that the contractor had been overpaid becomes irrelevant. The plaintiff ought to be credited with the amount. Based on the 7 certificates, the full amount of the purchase price of the properties ought to have been settled by the plaintiff upon the issue of LMD10. The defendant cannot, therefore, be heard to say that the full purchase price had not been paid.

Secondly, the defendant by its defence says that the supply agreement cannot be enforced against it by the plaintiff because:

(a) the terms and objects are uncertain;
(b) the agreement fails for want of consideration; and/or
(c) the agreement cannot be enforced for past consideration.

It is said that the terms and objects are uncertain because the value of the sawn timber to be supplied by the plaintiff to the contractor is only approximate and as such the actual quantum is not known. Lest it be forgotten, by the arrangement, the defendant is to have its project developed. The contractor is to develop it. The plaintiff is to supply the sawn timber for the purpose of the development of the defendant's project by the contractor. So, here there is a distinct contract between the plaintiff and the contractor for the supply of the sawn timber. If there is anything uncertain about the quantum of the sawn timber supplied, it is a matter between the contractor and the plaintiff and has nothing to do with the defendant and is not an issue here as between the defendant and the plaintiff. Apart from this contract, there is another distinct contract between the contractor and the defendant for the development of the project. If there is to be a dispute in regard to this contract, it is a matter for the defendant and the contractor. It is not an issue as between the plaintiff and the defendant. Then there is yet another contract between the plaintiff and the defendant for the purchase of the said properties by the plaintiff which is in issue before the Court. Initially the plaintiff and the defendant entered into 2 sale and purchase agreements for the purpose. Clause 3 of the said agreements makes provision for the method of payment for the purchase price. However, clause 5 of the supply aqgreement, for the reasons to be given later in this judgment, is without doubt a variation agreement in relation to the method of payment of the purchase price. The method of payment now is as stipulated in clause 2 of the supply agreement. I would not agree with the contention of the defendant that clause 5 does not vary the original sale and purchase agreements for the language of clause 5 is clear and unambiguous. In the circumstances the defence of the defendant on the ground that the supply agreement is void or unenforceable for uncertainty cannot be valid.

On the defence that the supply agreement fails for want of consideration, I would say that the contention of the defendant cannot also be accepted. Section 2(e) of the Contracts Act 1950 says that every, promise and every set of promises, forming the consideration for each other, is an

agreement and by s. 2(h) an agreement enforceable by law is a contract. Being a contract, a person in breach of it will have to suffer the consequences that flow from the breach. In our present case, what is this promise and set of promises? As between the plaintiff and the defendant, by the supply agreement, both parties had agreed to vary the relevant terms in the 2 sale and purchase agreements. Instead of the plaintiff having to pay by instalments as laid down in the First Schedule, the parties now agree that the full purchase price of the said properties shall be paid by the plaintiff to the defendant through deductions of 10% of each of the contractor's progress claims as certified by the architect until such time as when the full purchase price shall become fully settled: See clause 2 of the supply agreement exhibited as LMD3 to the affidavit of the plaintiff. The contractor on the other hand will be paid by the defendant for work done not on a 100% basis but on the basis of 90% only in consideration of the 10% to be deducted for the purpose of the said clause 2. As for the plaintiff, for the supply of the sawn timber to the contractor, it will also not be paid by the contractor on a 100% basis but on the basis of 90% only in consideration of the 10% deduction by the operation of clause 2: See clause 3 of LMD3. As for the defendant it is assured of the payment of the purchase price by the 10% deduction made from the progress claim money. So, in the circumstances, the supply agreement is a valid agreement and to say that it fails for want of consideration is not tenable at all.

On the defence that the supply agreement cannot be enforced for past consideration, I cannot see any merit in the contention. In the affidavit in opposition of the defendant it is averred that the consideration between the plaintiff and the defendant had already passed upon the signing of the 2 sale and purchase agreements. In his submission the learned Counsel for the defendant submits that what the defendant had agreed to was to be paid for the properties which was already agreed to be paid by the plaintiff under the sale and purchase agreements *albeit* through deductions. However, the learned Counsel has overlooked the effect of clause 5 of the supply agreement which as I stated earlier that by its clear and unambiguous provision the parties had agreed to vary the relevant terms of the earlier sale and purchase agreements by the provision of a fresh consideration. Hence it cannot be said that the supply agreement cannot be enforced for past consideration.

By its defence also the defendant avers that it is an implied term of the agreement that the contractor must complete the project to be entitled to the claims on the defendant. Is this so? What the agreement says is that for so long as there is the contractor's progress claim certified by the architect and for so long as the purchase price for the said properties remains unpaid, a 10% deduction is to be made from the progress claim so certified to meet the purpose. The language is so plain and clear. This was what the parties contemplated at the time they entered into the said agreement. It is hard to imagine a situation where the contractor has not done any work and yet a progress claim is certified in his favour. LMD4 to LMDl0 are evidence that progress claims are due to the contractor. So, whether the contractor completes the project or not is never to be in issue. So in the light of LMD4 to LMD10, if no deduction was made, the plaintiff cannot be said to have not made his payment towards the purchase price as agreed in clause 5 of the said agreement. The learned Counsel for the defendant in his submission is candid when he submits that although it was agreed that the defendant shall be paid towards the purchase price of the said properties by the deduction of the progress claims the fact remains that the deduction for the sum of RM66,946.64 were not made as all payments were made to the sub-contractors who completed the project. Deductions were made only in respect of LMD4 to LMD7. The question to ask here is why must all the payments be made to the sub-contractors, if it were so, when the requirement of the certificates is that the payment is due to the contractor? So in my judgment, even if no deduction was made, it is to be presumed that appropriate deductions were made in the light of the certificates of the architect issued in favour of the contractor and such deductions would go to the credit of the plaintiff towards the payment of the of the said properties mentioned in the two sale and purchase agreements. Hence the defence on this ground too has no merit.

The next issue is, if the deduction of the 10% out of the progress claim certificates is to be made, whose responsibility is it to make such deduction? The learned Counsel for the defendant

submits that the word "deduction" mentioned in the supply agreement cannot be attributed to the defendant alone but may also be attributed to the contractor from the progress payments made to it by the defendant. In my opinion, the duty to deduct rest solely on the defendant because the progress payment money would come from its pocket. The architect's certificates were addressed to it to make the payments to the contractor for the construction work done on the project. In any event the submission so made ran contrary to the evidence of Cyprian Tan Pia Jin at paragraph 7 of his affidavit in opposition when he deposed that what was agreed was that the defendant had agreed to deduct. So the question is answered that the responsibility to deduct is with the defendant and not with anyone else. Failure to do so renders the defendant liable for the consequences.

The issue that follows is, what is the effect of the supply agreement on the two sale and purchase agreements entered into between the plaintiff and the defendant? The learned Counsel for the defendant submits that the supply agreement does not vary the condition of payment as stipulated in clause 3 of the sale and purchase agreements. He says that the deduction is only to pay the purchase price generally which remains subject to the provisions in the sale and purchase agreement. This line of submission flies in the face of the express provision of clause 5 of the Supply Agreement which states that except for the method of payment for the said properties as mentioned in clause 2, all other terms and conditions contained in the said sale and purchase agreements shall remain unchanged. Thus, in the light of the said clause 5 both the plaintiff and the defendant have agreed that the purchase price for the said properties need not any longer be paid by "the instalments and at the time and in the manner as prescribed in the First Schedule annexed thereto," but instead to be by way of "deductions of ten percent (10%) of Each of the Main Contractor's Progress Claims as certified by the Architect until such time as when the full Purchase Price shall become fully settled." So, since the evidence from LMD4 to LMD10 shows that a total of RM1,310,866.30 is due by the operation of the Progress Claims certificates, 10% would work out to be RM131,086.63 which is more than what is required for the full settlement of the purchase price of the said properties by the plaintiff. So, by the operation of clause 22(ii) of the sale and purchase agreement, based on the undisputed evidence that the title to the said properties were both already registered in the name of the defendant since 3 February 1990, the defendant is obliged to execute valid and registrable transfer of the said properties to the plaintiff.

In the light of the above, I am satisfied that the plaintiff's application for judgment to be entered against the defendant under Order 14 must succeed on the ground that there is no defence to this action. Whatever defence put up by the defendant is sham. As by clause 23(i) of the sale and purchase agreement, all stamp duties and registration fees chargeable in respect of the preparation of the memoranda of transfer are to be borne by the plaintiff, the order prayed for by the plaintiff under prayer (1) will be varied accordingly. Specific performance of the said two sale and purchase agreements is hereby ordered against the defendant in favour of the plaintiff. The defendant is to execute valid and registrable memoranda of transfer in respect of the said properties and to deliver to the plaintiff the relevant documents of title to the said properties within one month from the date of this order.

As to the alternative application of the plaintiff under O. 18 r. 19 of the RHC, in the light of my decision on the O. 14 application, I am satisfied that the defence of the defendant has disclosed no reasonable defence, it is frivolous and vexatious and may prejudice, embarrass or delay the fair trial of the action or is otherwise an abuse of the process of Court. As for the counterclaim of the defendant, it is in the nature of a claim for the balance of the alleged sum from the purchase price of the said properties not having been paid in full. In the light of the reasoning given on the plaintiff's application under O. 14, I similarly hold that it must fail. In the circumstances, the defence and counterclaim of the defendant be struck out and judgment for the plaintiff be entered accordingly.

Costs of this application to the plaintiff to be taxed unless agreed.